

CECW-I

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
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Change 1

Circular
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EXPIRES 30 September 2010
Programs Management
EXECUTION OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 2009 --
CIVIL WORKS PROGRAM

1. Purpose. This Circular provides United States Army Corps of Engineers (USACE) program and project management guidance to govern execution of Civil Works funds provided by the American Recovery and Reinvestment Act of 2009, Public Law 111-5 as amended (the Recovery Act). The guidance herein is specific to the Recovery Act and is in addition to annual Civil Works execution guidance. This document provides guidance and is not to be construed as an official legal opinion regarding any particular item in the Recovery Act language or accompanying reports.

2. Applicability. This Circular applies to all USACE elements having Civil Works responsibilities and is applicable to all USACE Civil Works activities. District and Division offices and FOAs shall inform CECW-I of any problems with the implementation of this guidance.

3. Distribution Statement. Approved for public release; distribution is unlimited.

4. References.

a. The American Recovery and Reinvestment Act of 2009, Public Law 111-5; 123 Stat. 134.

b. ER 1105-2-100, especially Appendix F (Amendment 2).

c. OMB Memorandum M-09-10, 18 February 2009, Subject: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009.

d. OMB Memorandum M-09-15, 3 April 2009, Subject: Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009.

e. OMB Memorandum M-09-21, 22 June 2009, Subject: Implementing Guidance for the Reports on Use of Funds Pursuant to the American Recovery and Reinvestment Act of 2009.

f. OPERATIONS ORDER 2009-11 (USACE Execution of the American Recovery & Reinvestment Act 2009) and subsequent Fragmentary Orders.

g. Energy and Water Development and Related Agencies Appropriations Act, 2009, Division C of Public Law 111-8; 123 Stat. 601.

h. Supplemental Appropriations Act of 2009, Public Law 111-32.

i. USA ASA (ALT) Memorandum, dated 13 March 2009, subject: Posting Pre-Solicitation and Award Notices; Reporting Contract Actions; and Reporting Performance Assessments for Actions Funded by the American Recovery and Re-Investment Act of 2009.

j. Memorandum from Director of Civil Works, 17 June 2009, Subject: Pre-Approved Deviations for Use in Non-Federal Sponsor Performance Environmental Infrastructure Agreements When the Agreement Contemplates Reimbursement for the Federal Share Using Funds Made Available by the American Recovery and Reinvestment Act of 2009, Public Law 111-5.

5. Availability. This EC is available at the HQUSACE Publications web site.

6. Recovery Act Appropriations. Recovery Act funds will be executed using the following appropriation codes and names. Treasury Appropriation Funding Symbols (TAFS), apportionments, and the PBAS, CEFMS, and P2 systems are being modified accordingly.

- 3134 Construction, Recovery Act (Recovery C)
- 3135 Operation and Maintenance, Recovery Act (Recovery O&M)
- 3113 Mississippi River and Tributaries, Recovery Act (Recovery MR&T)
- 3133 Investigations, Recovery Act (Recovery I)
- 3136 Regulatory Program, Recovery Act (Recovery Regulatory Program)
- 3137 Formerly Utilized Sites Remedial Action Program, Recovery Act (Recovery FUSRAP)
- 3138 General Expense, Recovery Act

7. Definition of PPA. A program, project, or activity (PPA) is a water resources project study; a specifically authorized water resources project; an authorized environmental assistance program; a project in the Formerly Utilized Sites Remedial Action Program (FUSRAP); a project in the Continuing Authorities Program (CAP); work that has received an allocation in any Act or been directed to be performed in any Act; an item or sub-item appearing in the tables in any Statement of Managers / Conference Report for any fiscal year; or work that has received an allocation within the tables in any House Report or Senate Report for any fiscal year if not superseded by the applicable Statement of Managers / Conference Report.

8. Heretofore or Hereafter Funded PPAs. The Recovery Act specifies that Recovery Act funds in the Recovery C, Recovery I, Recovery MR&T, or Recovery O&M account may be used only for PPAs that heretofore or hereafter receive regularly appropriated

funds (funds appropriated in an Energy and Water Development Appropriations Act for the corresponding account). Since the funds expire at the end of FY 2010 (with limited exceptions, below), “hereafter” means in an FY 2009 or FY 2010 appropriation.

a. No new specifically authorized PPA may receive Recovery Act funds unless it first has received regularly appropriated Energy and Water Development funds. Projects proposed for funding in future Energy and Water bills are ineligible for Recovery Act funds unless and until such bills are enacted into law.

b. By policy, all CAP projects are PPAs. No CAP project may receive Recovery Act funds unless it first has received regularly appropriated Energy and Water Development funds.

c. Initiation of rehabilitation projects and deficiency correction projects traditionally has required new start decisions. No rehabilitation or deficiency correction project may receive Recovery Act funds unless it first has received regularly appropriated Energy and Water Development funds.

d. Addition of dredged material disposal facilities at operating projects traditionally has not required new start decisions. Any dredged material disposal facility may be funded with Recovery Act funds.

e. Dam safety assurance, seepage control, and static instability correction projects have not required new start decisions; rather, these projects are “born” in the Dam Safety/Seepage/Stability Program line item and “migrate” to line-item funding after meeting certain criteria. Consequently, any dam safety assurance, seepage control, and static instability correction project that has been funded with regular C funds, whether as a line item or with funds from the Dam Safety/Seepage/Stability Program line item, may be funded with Recovery Act funds in the Recovery C account.

f. A work item that is within a PPA and does not itself qualify as a PPA under paragraph 6 may be initiated with Recovery Act funds.

9. Relationship of Regular Funds, Supplemental Funds, and Recovery Act Funds.

Many PPAs will be funded with funds from different appropriation acts (e.g., Recovery Act, Energy and Water Development Appropriations Act, or Supplemental Appropriations Act.)

a. Supplemental funds must be used only for qualifying repair and restoration work (work that restores prior conditions in response to an emergency event). USACE policy is that Recovery Act funds may be used for qualifying repair and restoration work only if Supplemental funds are not available for allocation or reprogramming to perform the work. Recovery Act funds may be used to finance any costs over and above the costs of qualifying repair and restoration work.

b. The issuance of Recovery Act funds is based on capability over and above assumed FY 2009 appropriated funds and assumed FY 2010 budget funds. Actual FY 2009 or FY 2010 appropriated amounts may differ.

(1) USACE policy is that Recovery Act funds may not “crowd out” regularly appropriated funds from being obligated in FY 2009 or FY 2010, that is, Recovery Act funds may be used on a PPA only if all regularly appropriated or budgeted funds available to the project through FY 2010 could be obligated on the PPA by the end of FY 2010. If regularly appropriated or budgeted funds would be carried over to FY 2011, HQUSACE will revoke the surplus Recovery Act funds that would cause the carryover, and will apply the surplus Recovery Act funds to PPAs where such carryover would not result.

(2) USACE policy is that Recovery Act funds and regularly appropriated funds may be used on the same project to facilitate execution, but that, for any PPA receiving both Recovery Act funds and regularly appropriated funds, the work for which the regularly appropriated funds were intended to be used must be accomplished, as specified in justification sheets, the applicable Energy and Water Development Appropriations Act, or the accompanying Conference Report or Statement of Managers. See Reference 4.i for limitations related to using Recovery Act and non-Recovery act appropriated funds on the same contract.

10. Expiration of Funds.

a. Section 1603 of the Recovery Act specifies that Recovery Act funds will not be available for obligation after FY 2010 unless otherwise provided in the Act.

b. For the Recovery I, Recovery C, Recovery MR&T, Recovery O&M, and Recovery FUSRAP accounts, the Recovery Act provides that obligations of otherwise expired Recovery Act funds may be made after that date for “associated” supervision, inspection, and overhead (SIOH), engineering and design (E&D), and subsequent claims, if any. “Associated” means associated with contracts that will have been awarded with Recovery Act funds through FY 2010.

11. Completion of PPA Elements.

a. For the Recovery C, Recovery I, Recovery O&M, Recovery MR&T, and Recovery FUSRAP accounts, the Recovery Act specifies that the Recovery Act funds are to be used only for PPAs or elements of PPAs that can be completed within the funds made available in the applicable account and that will not require new budget authority to complete.

b. By policy, a completed PPA is a PPA that is fully funded and for which all contract work has a planned performance period ending by September 2015. (After September 2015, expired funds that would have been available for E&D, SIOH, or claims are cancelled and not available for any purpose.)

c. By policy, a completed element of a PPA is either one of the following.

(1) A contract, including all options, task orders, or incremental obligations, for which all funds are available (including E&D and SIOH) and that has a planned performance period ending by September 2015.

(2) A useful increment of work or project phase for which all funds are available (including E&D and SIOH) and for which all contract work has a planned performance period ending by September 2015.

(a) For Recovery I and Recovery MR&T Investigations, a useful increment is a completed work product, such as an EIS, Plans and Specifications, an LRR or GRR, or a report.

(b) For Recovery C, Recovery O&M, Recovery MR&T Maintenance, or Recovery FUSRAP, a feature or O&M work package is not a useful increment unless it produces water resources management (e.g. flood damage reduction, transportation) or FUSRAP outputs, services, benefits, or risk reduction on its own.

(c) Examples of project phases are reconnaissance, feasibility, PED, CAP feasibility, or a construction stage occurring before or after a hiatus, such as a levee lift or a renourishment cycle.

d. The “true” or “special” continuing contract clause and the incremental funding clause should not be used for new contracts funded exclusively with Recovery Act funds.

12. Section 902. The Construction and MR&T sections of the Recovery Act relieves PPAs that receive Recovery Act funds from the limitations of Section 902 of WRDA 86, as amended, but only through FY 2009. For a PPA that receives Recovery C funds or Recovery MR&T funds, this permits funds to be obligated and expended, and credit to be afforded for non-Federal contributions of lands, easements, rights of way, relocations, dredged material disposal areas, and in some cases work in kind, through FY 2009 without regard to the maximum project cost for that PPA. However, should the Section 902 limit for a PPA funded by either of these two sections be attained or surpassed in FY 2009 and no further relief be provided in law, then, after FY 2009, no additional obligations and expenditures may be made and no additional credits may be afforded since, despite the availability of Recovery Act funds past FY 2009, there would be no authority for the additional obligations, expenditures, or credits past FY 2009. Therefore, careful consideration should be given to any proposal that may exceed the maximum project cost. For instance, for any new contract or obligation that would exceed the limit, the performance period must be within FY 2009, so that both the contract work and the associated E&D and S&A are fully funded, obligated, and expended in FY 2009.

13. Section 102. The Recovery Act exempts credits and reimbursements funded with Recovery Act funds in the C account and the MR&T account from the \$100 million per year limit on credits and reimbursements. Credits and reimbursements made with regularly appropriated or Supplemental funds, or with Recovery Act funds under other appropriation titles, remain subject to the limit.

14. National Levee Safety Program. The Recovery Act exempts Recovery Act funds from the \$20 million per year program limit for this program. Regularly appropriated funds remain subject to the limit.

15. Inland Waterways Trust Fund. The Recovery Act specifies that no funds shall be drawn from the Inland Waterways Trust Fund for PPAs undertaken with Recovery C funds. Recovery Act funds provided to inland waterway projects will be drawn entirely from the general fund.

16. CAP Program.

a. Recovery C funds may be used for Sections 14, 205, 206, and 1135 notwithstanding their program cost limitations. Regularly appropriated C funds for these Sections are still subject to the annual program limits. For the other CAP Sections, Recovery C funds and regularly appropriated C funds in combination cannot exceed the annual program limits, as the limits have not been waived for the other Sections.

b. Execution of a Project Partnership Agreement is hereby authorized for any CAP project that meets all of the following conditions:

(1) The project is classified as Active.

(2) The project has received Recovery Act funds.

(3) The project has received more than \$50,000 in regular and/or Recovery Act funds for the Design and Implementation phase.

c. Each Project Partnership Agreement authorized for execution will be reviewed, approved, and executed in accordance with current policies and practices (see Appendix F, Amendment 2, Reference 4.b.). Note that authorization of an agreement execution pursuant to this paragraph and approval of the agreement as to form and content pursuant to Appendix F are two separate actions.

17. Issuance of Funds. Prior to enactment of the Supplemental Appropriations Act of 2009, which granted unlimited reprogramming authority for Civil Works Recovery Act funds, funds were being issued weekly based on known costs. With enactment, Recovery Act funds will be issued to each project for which Recovery Act work is approved, in the amount scheduled for obligation in the Current Adjusted schedule partially or entirely through FY 2010. To stay abreast of changes in schedules,

HQUSACE each month will compare for each project the available funds and the scheduled funds, and will issue the scheduled increment, if any. Funds also will be issued on short notice on request of a Division (as when a District wishes to award a contract based on an acceptable bid that exceeds available funds and the additional funds are not available to be reprogrammed). In FY 2010, schedules will be updated to reflect FY 2011 obligations for E&D and SIOH, and HQUSACE will issue all funds scheduled in the Current Adjusted schedule through FY 2011 and all funds estimated to be needed for E&D and SIOH beyond that. In June 2010, project lists will be finalized and remaining funds will be issued to projects.

18. Limits on Use and Reprogramming of Funds.

a. For the Recovery C, Recovery I, Recovery O&M, Recovery MR&T, and Recovery FUSRAP accounts, funds may be used only for work within the scope of the approved work packages posted on the USACE Recovery Act website.

b. The Supplemental Appropriations Act of 2009 granted unlimited reprogramming authority for Civil Works Recovery Act funds. Accordingly, Recovery Act funds are not included in the reprogramming baselines for PPAs to calculate reprogramming thresholds and limits, nor are reprogrammed Recovery Act funds included in cumulative amounts reprogrammed to compare against the thresholds and limits.

c. HQUSACE policy is to prohibit reprogramming of Civil Works Recovery Act funds to a PPA that has not received Recovery Act funds previously. It is presumed that such a recipient PPA is not on the approved list to receive Recovery Act funds.

d. Division approval is required for any reprogramming of Recovery Act funds. It is the responsibility of the approving Division to ensure that the reprogrammed funds will be used on an approved work package for the recipient PPA.

e. Not less than \$200 million of Recovery C funds is earmarked for environmental infrastructure projects. HQUSACE will monitor allocations of Recovery C funds to environmental infrastructure projects and reprogrammings of Recovery C funds to and from environmental infrastructure projects, to ensure compliance with the earmark.

f. Funds that are surplus to the needs of approved work packages for a project through FY 2010, other than funds to be carried over for E&D and SIOH, should be reprogrammed within the District or FOA to approved work packages and projects where the funds can be obligated prior to expiration. If there are no approved work packages or projects where the funds can be obligated prior to expiration, the funds should be offered promptly to the Division for reprogramming within the Division, or to HQUSACE for revocation (reprogramming). In May 2010, HQUSACE will revoke all remaining surplus funds in preparation for their reissuance in June 2010.

19. P2.

a. Project schedules should be updated to include Recovery Act funds as well as regularly appropriated and supplemental funds.

b. Where a contract or other work is to be funded by both regularly appropriated funds and Recovery Act funds, it should be represented in the Primavera network schedule by two activities, one each for the portion of the work resourced by the applicable Fund Type.

c. Primavera network activities funded with Recovery Act funds, especially contracts, must be named clearly so that, if needed, they may be associated easily with data reported under the Recovery Act.

d. Additional guidance on P2 is being provided separately.

20. Corps to Corps Reimbursable Work.

a. Labor: Activities must utilize the CEFMS labor cross charging functionally.

b. Contracts: Activities may send a MIPR(s) to cover contract award and travel costs. Alternatively, when consistent with USACE Project Management Business Practice, funds may be issued, or revoked and reissued, directly to the performing organization through a work allowance and FAD.

c. Paying Office on all contracts that cite USACE funds must be the Finance Center (UFC), Millington, TN.

21. Provision of Recovery Act Funds to Non-Federal Recipients.

a. Provision of Recovery Act funds to contractors is covered under Reference 4.f.

b. Reimbursements using Recovery Act funds to non-Federal project partners for the Federal share of work-in-kind performed by those partners are subject to section 1512 of the Recovery Act because the project partners are the "recipients" of Recovery Act funds. For each PPA under which reimbursements using Recovery Act funds will be made, a Project Partnership Agreement or amendment must be executed that requires the project partner to report on its uses of the funds in accordance with section 1512. The agreement or amendment must be executed before any further reimbursements are made. Reference 4.j.

c. A refund to a non-Federal project partner of excess non-Federal contributions (for instance, to balance Federal and non-Federal shares at project closeout) is not subject to Section 1512. A credit afforded for work-in-kind that offsets non-Federal cash payments but does not result in a reimbursement to the project partner for the work-in-kind is not subject to section 1512.

d. Grants, loans, cooperative agreements, and other non-contract instruments under which Recovery Act funds are provided to non-Federal recipients also are covered by section 1512. Notify CECW-IP of any such instances.

22. Contract versus In-House Work. USACE policy is to contract for Civil Works Recovery Act work wherever practicable, in order to maximize the stimulative effect of Recovery Act funds. Wherever a Division proposes to use in-house labor (including in-house labor at a performing organization under a Military Interdepartmental Purchase Request) to carry out Civil Works Recovery Act work, other than labor for E&D and SIOH, the Division should submit a request for a waiver to CECW-I for approval, together with the rationale for doing the work in-house. However, no waiver is needed to use temporary or term positions.

23. Additional guidance on the Regulatory Program was provided separately.

24. Additional guidance on compliance with the National Environmental Policy Act-related requirements of Section 1609 of the Recovery Act was provided separately.

FOR THE COMMANDER:

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Director of Civil Works